

FCC MAIL SECTION

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-306

In the Matter of

Request by Press RM-7994
Broadcasting Company, Inc.,
to Amend Section 76.51
of the Commission's Rules
to Include Clermont, Florida, in
the Orlando-Daytona Beach-Melbourne-
Cocoa, Florida, Television Market

NOTICE OF PROPOSED RULE MAKING

Adopted: December 21, 1992; Released: December 31, 1992

Comment Date: February 22, 1993

Reply Comment Date: March 9, 1993

By the Commission:

1. Before the Commission is a Petition for Rulemaking filed by Press Broadcasting Company, Inc. ("Press"), licensee of WKCF(TV), Channel 68 (Independent), Clermont, Florida, seeking to amend Section 76.51 of the Commission's Rules, 47 C.F.R. §76.51, to change the designation of the Orlando-Daytona Beach-Melbourne-Cocoa, Florida, television market¹ to include the community of Clermont, Florida. Public Notice of the filing of the Press petition was issued on May 22, 1992. No responsive pleadings were received.

BACKGROUND

2. By previous action, the Commission granted a Press request for waiver of Section 73.658(m) of the Commission's Rules to allow WKCF to be included in the subject market for purposes of the territorial exclusivity.² As a result, WKCF is able to compete with stations in the Orlando-Daytona Beach-Melbourne-Cocoa market for exclu-

sive rights to nonnetwork television programming. In addition, since the filing of the instant petition, the Commission granted a Press Petition for Extraordinary Relief and ruled that WKCF was a "local signal" in the market for mandatory cable carriage (and thus copyright) purposes for the period between December 11, 1989 and November 13, 1991.³ Press now requests that the Commission formally redesignate the market as requested in order that WKCF may now and in the future be considered a local station in the market area under the compulsory copyright license.

3. Specifically, Press states that despite the Commission's determinations regarding WKCF's competitive position in the subject market, some confusion and uncertainty remains as to whether the station is a local signal (and therefore not subject to distant signal copyright fees) for market-area cable systems under the compulsory copyright license, 17 U.S.C. § 111.⁴ Press notes that under the compulsory copyright license, a station is considered a "local signal" for purposes of determining a cable operator's copyright compensation liability based, in part, on the market designations contained in Section 76.51 of the Commission's Rules. Press acknowledges that the Commission is considering whether (and if so, how) to update the Section 76.51 listing of market designations,⁵ but contends that the Commission stated that it will not decline to act in the interim where an unambiguous fact pattern indicates that the rule appears to be functioning in conflict with its intended purpose.⁶ Press thus argues that the relief it requests is justified in light of the Commission's previous recognition of WKCF's competitive position in the subject market.

4. As to formal redesignation of the market, Press maintains that its previous request for relief from the territorial exclusivity rule demonstrates that it meets the criteria for redesignation of the market to include Clermont. Press incorporates and reiterates the showings contained in its previous submissions, including evidence that Clermont's proximity to Orlando (20 miles) forces it to compete for programming based on Orlando market rates. Further, Press contends that because WKCF already provides an over-the-air Grade B signal to virtually all of the existing market, redesignation of the market would not significantly expand the station's coverage area by obtaining local carriage status. Finally, Press asserts that in order to eliminate any possibility of further confusion or uncertainty as to its competitive position vis-a-vis other stations in the market -- which will assertedly assure its competitive viability in a manner consistent with the Commission's past actions with respect to WKCF -- the proposed redesignation is warranted.

¹ The Commission added the communities of Melbourne and Cocoa to the former Orlando-Daytona Beach Television market in 1985. *Major Television Markets (Orlando-Daytona Beach-Melbourne-Cocoa, Fla.)*, 102 FCC 2d 1062 (1985).

² See *Press Television Corp.*, 4 FCC Rcd 8799 (1989), *aff'd on recon.*, 6 FCC Rcd 6563 (1991) (*Press I*).

³ *Press Television Corporation*, FCC 92-460 (released November 9, 1992).

⁴ Press reports that the United States Copyright Office has advised one area cable operator that its carriage of WKCF would subject it to additional "distant signal" copyright liability based on the existing market designations of Section 76.51 despite the Commission's determination that the station is an actual competitor in the market.

⁵ *Further Notice of Proposed Rulemaking* in Gen. Docket No. 87-24, 3 FCC Rcd 6171 (1988). That rulemaking generally concerns a review of the scope of the territorial and cable television exclusivity rules and the market designations used for purposes of those rules, and related issues involving market designations and the compulsory copyright license. See 3 FCC Rcd at 6176, n.15. We note that the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385 (Cable Act of 1992), requires the Commission to make necessary revisions to Section 76.51 of the Commission's Rules, the list of television markets, in connection with a rulemaking proceeding on must-carry. That proceeding is going forward on a separate track.

⁶ *Press I*, 4 FCC Rcd at 8801.

DISCUSSION

5. The top 100 television markets, including hyphenated markets, are those specified in Section 76.51 of the Commission's Rules.⁷ This market list is not only used to determine territorial exclusivity rights under Section 73.658(m), but also helps define the scope of compulsory copyright license liability for cable operators. See 17 U.S.C. §111(f). The "hyphenation" of a market is based on the premise that stations licensed to any of the named communities in the hyphenated market do, in fact, compete with all stations licensed to such communities. See *CATV-Non Network Agreements*, 46 FCC 2d 892, 898 (1974). Redesignation of the market as requested in this case will permit market-area cable systems to carry WKCF on an equal basis with other television stations licensed to communities within the market without incurring "distant signal" copyright liability. It would also extend the area in which Orlando-Daytona Beach-Melbourne-Cocoa stations are considered local signals under the market definition provisions of the Commission's Rules, and thus redefine the area in which such stations may assert syndicated exclusivity and network nonduplication rights.

6. The Commission has defined a hyphenated television market as one characterized by more than one major population center supporting all stations in the market but with competing stations licensed to different cities within the market area. See *Cable Television Report & Order*, 36 FCC 2d 143, 176 (1972). Market hyphenation "helps equalize competition" where, due to population, geographic or other factors, some stations licensed to different communities beyond the Grade B contours of those stations in a given television market compete for economic support. *Id.* In evaluating past requests for hyphenation of a market, the Commission has considered some or all of the following factors as relevant to its examination: (1) the distance between the proposed community and the existing designated communities; (2) whether cable carriage, if afforded to the subject station, would extend to areas beyond its Grade B signal coverage area; (3) the presence of a clear showing of a particularized need by the station requesting the change of market designation; and (4) an indication of benefit to the public from the proposed change. See, e.g., *Major Television Markets (Fresno-Visalia, Calif.)*, 57 RR 2d 1122 (1985). Each of these factors assists the Commission to evaluate individual market conditions consistent with the underlying competitive purpose of the market hyphenation rule to delineate areas where stations can and do, both actually and logically, compete.

7. Based on the facts presented, we believe that a sufficient case for market hyphenation has been set forth so that this proposal should be tested through the rulemaking process and comment requested from interested parties. Accordingly, we seek comment on adding Clermont to the hyphenated Orlando-Daytona Beach-Melbourne-Cocoa, Florida, market as requested by Press. It appears from the information before us that WKCF and the stations in the presently designated market have coverage areas that substantially overlap and that such stations do, in fact, compete for audiences throughout the market area. Although the communities involved are not directly adjacent, the location of WKCF's transmitting antenna on the same broadcast tower used by a Daytona Beach station supports

treating the two stations as part of the same market. Arbitron's conclusion that Clermont is within the Orlando-Daytona Beach-Melbourne "area of dominant influence" also supports this conclusion. The fact that WKCF and other market-area stations are economically interdependent and competitive further underscores our tentative conclusion that WKCF is "local" in the market proposed to be redesignated.

8. Accordingly, based on our stated policy considerations, we tentatively conclude that Section 76.51 of the Commission's Rules should be amended by adding Clermont to the Orlando-Daytona Beach-Melbourne-Cocoa, Florida, market designation, and we seek comment on this tentative conclusion.

ADMINISTRATIVE MATTERS

Ex Parte Rules -- Non-Restricted Proceeding

9. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Comment Information

10. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before **February 22, 1993**, and reply comments on or before **March 9, 1993**. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

Initial Regulatory Flexibility Analysis

11. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. A few number of television licensees and permittees will be affected by the proposed rule amendment. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

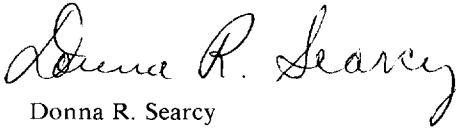
⁷ The Orlando-Daytona Beach-Melbourne-Cocoa television market is currently ranked 55th in Section 76.51. For markets

not listed in Section 76.51, the Commission refers to the most recent ARB *Television Market Analysis*.

Additional Information

12. For additional information on this proceeding, contact Alan E. Aronowitz, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "Donna R. Searcy".

Donna R. Searcy
Secretary